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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Regarding	)	CC Docket No. 01-92
Intercarrier Compensation for Wireless	)	
Traffic	)	

RURAL ILEC OPPOSITION TO
THE PETITION FOR DECLARATORY RULING

The South Dakota Telephone Association (SDTA), Townes Telecommunications, lnc. (Townes'), Public Service Telephone Company (PSTC) and Western Iowa Telephone Association (WITA)(jointly referred to as the Rural ILECs), by their attorneys, hereby oppose the Petition for Declaratory Ruling filed by CMRS Petitioners. The CMRS Petitioners ask the Commission to declare that it is unlawful for incumbent local exchange carriers (ILECs) to file reciprocal compensation rates in state tariffs. The Rural ILECs ask the Commission to deny the Petition and find that ILECs may file tariffs as a reasonable mechanism to protect their right to be compensated for call termination.

I. The Rural ILECs' Interests

SDTA is an association of 30 independent, cooperative and municipal incumbent local exchange carriers (ILECs) serving rural areas in South Dakota. PSTC and WITA are small ILECs serving rural areas in Georgia and Iowa, respectively. Townes is affiliated with several

[1] Two of Townes' affiliates, Mokan Dial, Inc. and Choctaw Telephone Co. are also participating in comments filed today by the Missouri Independent Telephone Company Group.

small ILECs serving rural areas in Florida, Arkansas, Missouri, Texas, Colorado and Kansas. All of these ILECs are ''rural telephone companies" as defined in 47 U.S.C. §153(37). The interconnection and compensation obligations discussed in the Petition also apply to the SDTA carriers, Townes, PSTC and WITA and, therefore, the Commission's decision in this matter will impact their interests.

II. Tariffs are a Reasonable Mechanism to Ensure Compensation When the CMRS Provider Interconnects Through a Tandem Switch

The CMRS Petitioners submit the Petition pursuant to section 332(c) of the Communications Act of 1934, as amended (the Act), which requires common carriers to establish physical connections with CMRS providers. According to the CMRS Petitioners, the Commission in its orders implementing this section has declared that an ILEC engages in an unlawful practice when it unilaterally files wireless termination tariffs. The CMRS Petitioners ask the Commission to "reaffirm" its prior rulings and find that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Act.[2] The CMRS Petitioners also apparently assert that compensation should be paid only when the LEC and CMRS carrier have entered into an interconnection agreement under section 251 of the Act. The CMRS Petitioners ask the Commission to order the ILECs to withdraw such tariffs or, in the alternative, to declare that such tariffs are unlawful, void and of no effect.

Section 332(c)(1)(B) of the Act states that "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act." In

[2] Petition for Declaratory Ruling at *8*

implementing this section, the Commission found that common carriers must provide the type of interconnection reasonably requested by any CMRS provider.[3] The Commission also required LECs and CMRS providers to compensate each other for the reasonable costs incurred in terminating traffic.[4] In addition, section 251 of the Act requires local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications.[5]

The CMRS Petitioners allege that the use of the tariff mechanism to set termination rates amounts to a unilateral interconnection action by the ILECs, in contravention of sections 332 and 251 of the Act and the Commission's orders, which require mutual, negotiated rates. It must be recognized, however, that this controversy is the direct result of unilateral actions taken by the CMRS providers. Thus, the CMRS providers -- not the rural ILECs-- unilaterally determined to interconnect indirectly with rural ILECs through interconnection agreements between the CMRS provider and a third party tandem provider. In addition, the CMRS providers have unilaterally imposed a bill and keep reciprocal compensation mechanism on ILECs by sending traffic through the tandem to the rural ILEC without negotiating a reciprocal compensation agreement with the rural ILEC. The result of these unilateral actions on the part of CMRS providers is that rural ILECs terminate traffic for carriers that they do not know, cannot immediately identify and with whom they have no agreement or mechanism to obtain the termination compensation to which they are entitled.

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[3] ***Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,*** GN Docket No. **93-252,** Second Report and Order, **9** FCC Rcd. **1411, 1498** (1994)(*CMRS Second Report and Order).*

[4] ***Id.***

[5] **47** U.S.C. §251(b)(5).

There is no dispute that tandem providers and the CMRS providers are entering into agreements without the knowledge or involvement of the ILECs. While these agreements ensure that the tandem provider will be compensated for the tandem function for traffic that originates and terminates between rural ILECs and CMRS providers, they effectively impose bill and keep on the ILECs that are not part of the negotiation. Where the interconnection method involves 3 carriers (like indirect tandem interconnection) 3-party negotiations may be the better approach. **As** it is, without such 3-party negotiations, the ILECs have no knowledge of the arrangement and no ability to ensure proper identification of traffic. The result is the *de facto* imposition of bill and keep on the ILECs by CMRS providers.

A. Bill and **Keep** Cannot be Unilaterally Imposed by **the** CMRS Providers

The CMRS Petitioners apparently assert that bill and keep is the "status quo" and if the ILECs seek to change the status quo they can only do so through a negotiated interconnection agreement.[6] Bill and keep, however, is not the status quo pursuant to the Commission's orders. For instance, in the context of section **252** interconnection agreements the Commission has found that parties can mutually agree to a bill and keep compensation mechanism.[7] However, there is no mutual agreement here. Indeed, no tariffs would have been necessary absent the Petitioners' desire to get a free ride for transport and termination services. In addition, the Commission has found that bill and keep can only be imposed during the section **252** arbitration process if a state commission finds that the exchange of traffic between the parties is approximately equivalent

[6] Petition for Declaratory Ruling at 10.

[7] ***Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,*** First Report and Order, CC Docket Nos. **96-98** and **95-185,** 11 FCC Rcd **15499, 16056** (released August **8, 1996).** The Commission may take official notice on this score of the publicly filed interconnection agreements that establish the traffic imbalance (in favor of wireline to wireless calls) at 80% / 20% or higher ratio.

and neither carrier has rebutted the presumption of symmetrical rates.' Thus, there is no preference in favor of bill and keep under current law and there is no support for the CMRS providers' position that they should be able to unilaterally impose bill and keep on ILECs.

On the contrary, bill and keep is the "status quo" in this context only because of the nature of interconnected networks and the unilateral actions of the CMRS providers which operate to hide the identity and existence of the CMRS provider from the rural ILEC when tandem interconnection is employed, and thereby allow the CMRS provider to terminate its traffic free of charge. The attendant harm to the rural ILEC is significant, as it improperly shifts CMRS costs onto the ILEC itself.

B. <u>After the Fact Negotiated Agreements are not Sufficient</u>

The CMRS Petitioners' assertion that they are willing to negotiate interconnection agreements with small ILECs, on request, is disingenuous, and, in any event, it does not solve the problem of uncompensated calls. As an initial matter, if CMRS Petitioners are willing to negotiate reciprocal compensation agreements with rural ILECs, then they should have done so when they negotiated interconnection agreements with the tandem provider.

In addition, it is not clear that ILECs can require CMRS providers to negotiate a reciprocal compensation agreement, as suggested by Petitioners. In any event, even if ILECs could force CMRS providers to negotiate pursuant to section 251 of the Act, it would not be possible for the ILEC to do so until the CMRS provider is identified. Due to the nature of interconnected networks and tandem connections, the rural ILEC will not know that it is receiving traffic from a carrier with which it does not have an agreement until after traffic has been terminated and the tandem carrier refuses to pay the associated reciprocal compensation,

[8] *Id.* at **16054-16055**

asserting that the traffic originated from another carrier. Thus, even if the ILEC can request negotiation at this point, it will have terminated traffic for the CMRS provider for which it has no mechanism to receive payment.

It is clear that the ILECs are entitled to be compensated for calls they terminate.[9] It is also clear that the actions (or lack thereof) of the CMRS providers have prevented and continue to prevent the ILECs from entering into agreements for the compensation to which they are entitled before traffic is exchanged. The CMRS providers could prevent the problem by requesting to negotiate reciprocal compensation agreements with rural ILECs when they negotiate an agreement with the tandem provider. However, to the extent that CMRS providers do not request negotiation with the rural ILECs, tariffing is a reasonable solution to a problem which has been created by CMRS providers.

In the context of the detariffing of domestic interexchange services, a similar inequitable situation occurred and the Commission found interim tariffs to be an appropriate solution. Specifically, when the Commission required interexchange carriers (IXCs) to detariff their services in favor of negotiated contracts, it was determined that customers ordering interexchange services through local exchange carriers would be able to use an IXC's service before the IXC had an opportunity to obtain an agreement. In order to allow the IXCs to receive payment for services rendered in this situation, the Commission allowed IXCs to tariff their services for a period of **45** days, during which time the IXC could obtain a contract with the

[9] *CMRS Second Report and Order* at **1498.**

customer.[10] Similar equities are present here, which justify the use of tariffs. The tariff is the only mechanism to prevent the unjust enrichment of the wireless carrier that refuses to request negotiation with the rural ILEC.

Rural ILECs, in many cases, serve customers via end offices that interconnect with the tandem of a larger ILEC. In these cases, the volume of tandem traffic is significant in proportion to the total traffic for these small ILECs, which results in a proportionately greater number of uncompensated calls. When wireless carriers 'dump' traffic onto the networks of the rural ILECs through a 3rd party tandem, without the rural ILEC's knowledge or control, costs are imposed upon these rural ILECs for which no cost recovery mechanism is available. Additionally, there is no incentive for the wireless carrier to request negotiations for reciprocal compensation since the balance of traffic is most likely weighted in favor of the ILECs. Rural ILECs cannot depend on the tandem provider to protect their interests. In the Missouri example, while Southwestern Bell's tariff contains a provision, effective February 1998, that its service ends at the interconnection point, and that wireless carriers cannot deliver traffic destined for 3rd party ILECs without having a specific interconnection agreement with the terminating ILEC, traffic continued to be delivered through the tandem. The Missouri Commission approved wireless termination tariffs as a means to assure fair compensation for the rural ILECs.

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[10] ***Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 245(g) of the CommunicationsAct of 1934***, CC Docket No. 96-61, Order on Reconsideration, 12 FCC 15014, 15037-8 (1997). ***See also, Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934,*** CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999); ***Domestic, Interexchange Carrier Detariffing Order Takes Effect,*** CC Docket No. 96-61, Public Notice, DA 00-1028 (Com. Car. Bur. May 9, 2000); ***MCZ WorldCom, Znc. v. FCC***, 209 F.3d 760 (D.C. Cir. 2000)(affirming detariffing rules).

At a minimum, ILECs should be allowed to tariff termination rates to allow compensation until an agreement is in place. Any other result would force ILECs to provide transport and termination services for free, and would be confiscatory and unlawful

III. Conclusion

Based on the foregoing, the Rural ILECs ask the Commission to deny the Petition for Declaratory Ruling and find that ILECs may file tariffs, as discussed herein, as a reasonable mechanism to protect their right to be compensated for call termination.

Respectfully submitted,

TOWNES TELECOMMUNICATIONS, INC.

PUBLIC SERVICE TELEPHONE COMPANY

WESTERN IOWA TELEPHONE ASSOCIATION

By _____

Benjamin H. Dickens, Jr.
Mary J. Sisak

Blooston, Mordkofsky, Dickens, Duffy & Prendergast
2120 L Street, NW Suite 300
Washington, DC 20037
(202) 659-0830

Their Attorneys

THE SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

By _____

Richard D. Coit, General Counsel

South Dakota Telecommunications Association
P.O. Box 57
Pierre, SD 57501
(605) 224-7629

Dated: October 18, 2002

CERTIFICATE OF SERVICE

I, Douglas W. Everette, hereby certify that I am an attorney with the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and that copies of the foregoing "Rural ILEC Opposition to the Petition for Declaratory Ruling" were served by first class U.S. mail or hand delivery* on this 18th day of October, 2002 to the persons listed below:

*Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

*Qualex International
Portals II
445 12th St. S.W.
Room CY-B402
Washington DC 20554

*Tamara Preiss, Chief,
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street SW - Room 5-A225
Washington, D.C. 20554

*Barry J. Ohlson, Chief
Policy Division
Wireless Telecommunications Bureau
445 12th Street, S.W. - Room 3-C300
Washington, D.C. 20554

Gene A. DeJordy
Vice President, Regulatory Affairs
Western Wireless Corporation
3650 131" Avenue SE, Suite 400
Bellevue, WA 98006

Leonard J. Kennedy
Joel M. Margolis
Nextel Communications, Inc.
2001 Edmond Halley Drive
Reston, VA 20191

Brent Eilefson
Corporate Counsel
Nextel Partners, Inc.
10120 W. 76th Street
Eden Praire, MN 55344

Brian T. O'Connor
Harold Salters
T-Mobile USA, Inc.
401 9th Street NW, Suite 550
Washington, DC 20004

Greg Tedesco
Executive Director
T-Mobile USA, Inc.
2380 Bisso Drive, Suite 115
Concord, CA 94520-4821

Dan Menser
Senior Corporate Counsel
T-Mobile USA, Inc.
12920 SE 38th Street
Bellevue, WA 98006

Douglas W. Everette